IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-786

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA,
Petitioner,

v.

MARY ROSE GREENE GOD, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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JURISDICTION

Respondent submits this Court lacks jurisdiction to review the subject decisions of the Supreme Court of Virginia under Title 28, United States Code, Section 1257(3) in that there was no federal constitutional issue raised in the Courts below, nor is there any controlling federal question involved in this case.

QUESTIONS PRESENTED

1. Whether the decision of the Supreme Court of Virginia was grounded in the Virginia Constitution and in Virginia Statutes.

2. Whether the federal question had been previously raised on a decision which rested on adequate and independent state grounds.

3. Whether the decision turned on its own particular facts and circumstances and thus presented no question of general importance sufficient to be worthy of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

Respondents respectfully submit that the Fourteenth Amendment to the United States Constitution was not involved in the decision of the court below. That court's decision was, and this Court's review should be, limited to:

Va. Const., Art. I, § 1, Appendix *infra* at 1a,
Va. Const., Art. I, § 8, Appendix *infra* at 1a-2a,
Va. Const., Art. I, § 11, Appendix *infra* at 2a,
Va. Code Ann., § 15.1-486, Appendix *infra* at 2a-3a,
Va. Code Ann., § 15.1-488, Appendix *infra* at 3a;
Va. Code Ann., § 15.1-489, Appendix *infra* at 3a-4a,
Va. Code Ann., § 15.1-510, Appendix *infra* at 4a.

STATEMENT OF THE CASE

The subject property is part of an irregularly shaped, but generally rectangular, block. The comprehensive zoning ordinance adopted by the County Board in 1950 drew a line through this block placing the major portion of the block in the R-6 residential category with a minor portion along 21st as part of the contiguous apartment zoning category, RA6-15. Thereafter, as the development of the area actually began, the County Board changed the character of the

block by a series of apartment zoning approvals, marching in sequence westward down the block. (See Exhibit C-14 and the successive overlays) The use of the remaining portion of the block, also as apartments, became reasonably predictable and use of the subject lot for a single family house, because of the surrounding circumstances, was no longer feasible. (Court's Memorandum, App. 5a)

At the time of the hearing before the Arlington County Board, when the subject rezoning application was denied, the County Land Use Plan in existence at that time had placed the subject property in an "undetermined" category.

The North Highland Neighborhood Conservation Plan, a plan devised by the neighborhood citizens association, through a quasi-official governmental arrangement, and relied upon in part by the County Board contained an error of fact in regard to the existing use of a critical nearby land quadrant. The citizens association had shown a single family residence diagonally across from the subject property where actually there existed a four unit apartment house. (Court's Memorandum, App. 5a)

The rear of the subject land has the Fort Bennett Apartment buildings "peering down on it" across a narrow 40-foot lot. On one side are very old houses already zoned for RA6-15 and obviously soon to become apartments. On the other side is a frame house already 60 years old and itself facing the rear of other cottages along the narrow 21st street. To the front of the subject property are the rear yards of four residences, themselves facing Rolfe Street. Two of these four residences are already zoned for RA8-18, for a higher apartment use. A fifth property in this RA8-18

area has already been developed as a four unit apartment building diagonally in front of the subject land. The subject land is then virtually an "orphan" not suitable as R-6. (Court's Memorandum App. 5a)

The County Board of Arlington denied the application for rezoning. The Appellee then applied to the Court for a Declaratory Judgment and after a full trial the Court found that the action of the County Board had been arbitrary and capricious and entered Judgment for the Respondent.

The County Board of Arlington applied to the Supreme Court of Virginia for a Writ of Error, which was granted and a full hearing was had upon the County Board's Appeal. The trial Court's decision was affirmed in part, reversed in part, and remanded. (App. 1A). In so doing the Supreme Court of Virginia agreed with the trial Court that the County Board of Arlington's denial of the rezoning application was discriminatory as to the Respondent and therefore arbitrary and capricious.

SUMMARY OF ARGUMENT

I. The decisions of the Supreme Court of Virginia were grounded in the Virginia Constitution and in Virginia statutes. Both opinions hold the actions of the Board of Supervisors were "discriminatory," were "arbitrary and capricious," and bore "no reasonable or substantial relation to the public health, safety, morals, or general welfare."

State courts have developed a body of state constitutional law by which they review uses of state police power. Sometimes based on state due process clauses, sometimes on more general precepts of the

limits of the police power, these state standards exist independently of federal law.

Virginia, like the other states, has evolved state constitutional doctrines which its courts have used regularly to measure exercises of the police power generally and the zoning power specifically. In applying these standards, Virginia courts ask whether actions are "discriminatory," "arbitrary and capricious," or "unreasonable."

An opinion firmly grounded in state law raises no question of federal law appropriate for review in this Court.

II. No federal question has been previously raised in order to give the Court jurisdiction to review the Judgment on Writ of Certiorari. The decision of the Supreme Court of Virginia rests on adequate and independent state grounds.

III. Even assuming, arguendo, the decisions below implicated federal constitutional standards, this case is tied to its peculiar facts and circumstances. As such, it is not worthy of certiorari. The case is bound up in the particular circumstances of Arlington County and can be of little help in guiding courts in other states.

ARGUMENT

I. The Decision of the Supreme Court of Virginia was Grounded in the Virginia Constitution and in Virginia Statutes.

Certiorari does not lie in this case unless Petitioner can show, as required by 28 U.S.C. § 1257 (s), that the "validity of a State statute is drawn in question on the ground of its being repugnant to the [Federal]

Constitution . . ." If the decision rests on grounds of Virginia law, this Court lacks jurisdiction and the petition for writ of certiorari must be dismissed.

A reading of the Opinion in this case demonstrates that it was based upon Virginia law, both constitutional and statutory, and relied upon current decisions from the same Court. *Board of Supervisors of Fairfax County* v. *Allman,* 215 Va. 434, 211 S.E.2d 48 (1975).

It is of interest to note that the County Board of Arlington in its Petition for a Writ of Certiorari does not refer to the Allman case, although the Allman case involved the identical principles of law and identical decision by the Supreme Court of Virginia and a denial by this Court of a Petition for Writ of Certiorari where Fairfax County raised the same issues raised here. (The *Board of Supervisors of Fairfax County* v. *Allman, et al,* Supreme Court of the United States, No. 75-388.) The Opinion here was based upon Virginia law, both constitutional and statutory.

The operative paragraph of the *Allman* decision is short (211 S.E.2d at 55):

> Allman has overcome the presumption of legislative validity that attached to the action of the Board in reaffirming a RE-1 classification for his land. His evidence established a course of action by the Board that was inconsistent and discriminatory. A discriminatory action is an arbitrary and a capricious action, and bears no reasonable or substantial relation to the public health, safety, morals or general welfare. The reasonableness of the Board's action is not fairly debatable, and it will not be sustained.

Similar language appears in the instant case:

> "The landowner's evidence was sufficient to overcome the presumed legislative validity of the Board's action and to show that the denial was unreasonable. The Board, however, in its turn, failed to produce evidence sufficient to show that the denial was reasonable. The question, then, was not fairly debatable. See *City of Richmond* v. *Randall, supra,* 215 Va. 511, S.E.2d at 60. Under the circumstances of this case, the denial of the rezoning application was discriminatory and, therefore, arbitrary and capricious. See Board of *Supervisors of Fairfax County* v. *Allman,* supra, 215 Va. at 445, 211 S.E.2d at 55." (App. 2a)

The key to both decisions therefore is an understanding of what grounds, constitutional or otherwise, underlie the Virginia Court's language of "discrimination," of "arbitrary and capricious," of actions bearing "no reasonable or substantial relation to the public health, safety, morals, or general welfare."

Petitioner would have this Court read the Virginia decisions as resting on the Fourteenth Amendment. Petitioner argues that "discrimination" must mean Fourteenth Amendment equal protection and that, in fashioning its standards for review of Arlington County's exercise of its delegated police powers in this case, the Virginia Court was using Fourteenth Amendment due process. So to argue betrays a woeful misunderstanding of a vast body of state constitutional doctrine upon which state courts, both in Virginia and the states at large, have drawn to use due process and other clauses in state constitutions to strike down discriminatory acts by government. Petitioner's argument also ignores the extent to which Virginia zoning decisions, both those now before this

Court and other earlier ones, have turned heavily on state statutes—the enabling acts which confer powers on local governments and which Virginia's courts strictly construe in reviewing the exercise of those powers.

The Virginia decision in *Allman* and in this case, in declaring that "discriminatory" acts are arbitrary and capricious and hence not valid exercises of the police power, rest on a well-developed body of state constitutional law which, long before the existence of the Fourteenth Amendment, served as the basis for state courts to review governmental acts. Sometimes due process is couched in terms of requiring adherence to the "law of the land"—the language which appears in Article I, Section 8 of Virginia's Constitution[1]—and sometimes as "due process of law"—language appearing in Virginia's Article I, Section 11.[2] (Both the United States Supreme Court and the state courts have consistently understood "due process of law" and "law of the land" to be synonymous.)[3]

Due process of law in American jurisprudence embodies several fundamental principles:

(1) Due process of law has long connoted general application of the laws. As Daniel Webster said in his celebrated argument in the *Dartmouth College* case: "By the law of the land is most clearly intended the general law. . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities,

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[1] See Appendix, p. 1a *infra*.

[2] See Appendix, p. 2a *infra*.

[3] See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. (59 U.S.) 272, 276 (1856).

under the protection of the general rules which govern society."'[4] State courts from early days applied this principle.[5]

(2) Due process of law has long operated as a restraint on the arbitrary or capricious exercise of power. As this Court said in *Dent* v. *West Virginia*, 129 U.S. 114, 124 (1889), "The great purpose of the requirement [of due process] is to exclude everything that is arbitrary and capricous in legislation affecting the rights of the citizen."'[6]

(3) Due process of law has long been used to protect individuals, and their life, liberty, and property, against discriminatory acts of government. The leading commentator on Virginia's Constitution has observed, "Well before the term 'equal protection' became a familiar landmark in American jurisprudence, protection against governmental discrimination and insurance of the general application of the laws were accepted connotations of Anglo-American due process of law." A. E. Dick Howard, *Commentaries on the Constitution of Virginia* (1974), I, 229-30 [hereinafter *Howard's Commentaries*]. In its report to the General Assembly, Virginia's Commission on Constitutional Revision (three of whose members sit today on the Supreme Court of Virginia) noted that "due process of law has often been understood to prohibit invidious discrimination."'[7]

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[4] *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. (17 U.S.) 518, 581 (1819).

[5] See, *e.g.*, *Vanzant* v. *Waddell*, 10 Tenn. 259, 270 (1829).

[6] See also 16 Am. Jur.2d, "Constitutional Law" § 550 at 946-47: due process of law and the equivalent phrase law of the land require that classification must not be arbitrary and capricious.

[7] *The Constitution of Virginia: Report of the Commission on Constitutional Revision* (1969), p. 96 [hereinafter *CCR Report*].

(4) Due process of law overlaps with equal protection of the laws. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954)—companion case to *Brown* v. *Board of Education*—struck down public school segregation in the District of Columbia. The Court in *Brown* relied on equal protection, but in *Bolling* it rested on the due process clause of the Fifth Amendment. Chief Justice Warren noted that "as this Court has recognized, discrimination may be so unjustified as to be violative of due process." 347 U.S. at 499.

All of these traditional bases of due process of law —general application of the laws, restraint on arbitrary or capricious acts, protection against discrimination, and ensuring equal treatment—are reflected in the Virginia Court's decisions in *Allman* and in the instant case. Clearly there is no valid reason to suppose that that opinion was grounded in the federal equal protection clause. Petitioner's effort to prove otherwise rests on the sheerest speculation.

Moreover, the Virginia opinions in *Allman* and in this case bear no resemblance to federal standards of due process. They belong instead to the tradition, a well established one, that state courts reviewing exercises of state police power use standards having a basis independent of the Federal Constitution. The source of these standards includes but is not limited to due process of law. This Court has recognized this independent body of state law, observing, for example, in *Minnesota* v. *National Tea Co.,* 209 U.S. 551, 556-57 (1940), that the New York Court of Appeals "has ruled that its own conception of due process governs, though the same phrase in the federal constitution may have been given different scope by decisions of this Court."

With the withdrawal of the United States Supreme Court from reviewing state economic measures, "state constitutional law in some aspects [has become] the primary reliance and battleground for interests pressing for vindication."[8] The result has been the persistence of substantive due process and related concepts among the states—a willingness of courts, using doctrines drawn from state constitutional law, to take a closer look at applications of the police power than a federal court would be entitled to do under the Federal Constitution.

> Therefore, it is not surprising that just as the doctrine of substantive due process was finding expression in the states *before* 1890, so also the principle should continue to enjoy a vigorous life in some states *after* it has fallen into disuse on the national level. . . . In more recent years, state supreme courts have relied solely upon their own state constitutions.[9]

What we call "substantive due process" does not always spring from a due process clause as such (although frequently, of course, it does). Limitations on legislative power arise from clauses guaranteeing natural rights,[10] guarantees of "due course of law,"[11] or

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[8] Paul A. Freund, "Foreword," in *Howard's Commentaries,* p. viii.

[9] Monrad G. Paulsen, "The Persistence of Substantive Due Process in the States," 34 *Minn. L. Rev.* 91, 93, 98 (1950). See also John A. C. Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 *Nw. U. L. Rev.* 13, 226 (1958). Substantive due process is generally traced back to *Wynhamer* v. *People,* 13 N.Y. 378 (1856). See generally Edward S. Corwin, "The Doctrine of Due Process of Law Before the Civil War," 24 *Harv. L. Rev.* 366 (1911).

[10] *E.g.,* Va. Const., Art. I, § 1.

[11] *E.g.,* Ind. Const., Art. I, § 12.

from due process or "law of the land" provisions,[12] among others. A state constitution may contain more than one such clause; an example is the Virginia Constitution.[13] Whatever the language, such provisions have the common attribute of placing unspecified general limits on exercises of the power—limits that are expressed in terms of "discrimination," or "arbitrary and capricious," or like language.

The United States Supreme Court, especially since decisions like *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), and *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), has taken a largely "hands off" attitude to state exercise of the police power in the economic sphere. The Court will, of course, have reason to intervene if that police power is used to infringe federally protected rights (*e.g.*, that private property not be taken without compensation). But where and how to circumscribe the police power is otherwise a matter for the states and their courts.[14]

Even more than many states, Virginia is notable for the vitality of its tendency to look to its own constitu-

[12] *E.g.*, Minn. Const., Art. I, § 2.

[13] See Va. Const., Art. I, § 1 (natural rights), Art. I, § 11 (due process).

[14] State courts consciously have in mind the vindication of values which a federal court faithful to the teachings of *Ferguson* has no place applying. State courts, using due process or other standards, have limited state police power in the name, for example, of the right to the "fruits of one's own industry," *State ex rel. Whetsel* v. *Wood*, 207 Okla. 193, 196, 248 P.2d 612 (1952) (invalidating statute regulating watchmakers), and a belief in "full and free competition," *Union Carbide & Carbon Corp.* v. *White River Distributors*, 224 Ark. 558, 275 S.W.2d 455, 458 (1955) (striking down "fair trade" law).

tional doctrines and the rights of the individual. In its 1969 report to the General Assembly, the Commission on Constitutional Revision—whose chairman wrote the *Allman* opinion now before this Court—admonished that, although most of the Virginia Bill of Rights provisions have a parallel in the Federal Bill of Rights, there is "no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians."[15]

Limitations on the police power. Especially relevant to the present case is the persistence in Virginia of judicial willingness to give closer scrutiny to the exercise of the state police power, as a matter of state constitutional doctrine, than would be appropriate for a federal court applying federal constitutional standards.

A leading Virginia case on the limits of the police power, *Young* v. *Commonwealth*, 101 Va. 853, 45 S.E. 327, 331 (1903), invalidated the conviction of a merchant who had given trading stamps in violation of state law. After a lengthy analysis of the meaning of "liberty" in the context of one's right to pursue a living, the Court ruled that the legislature had acted "arbitrarily" in enacting a statute not "reasonably necessary" to the legislature's purpose. The Court rested its decision on Article I, Section 8 of the Virginia Constitution; it expressly declined to address an equal protection claim.

Since *Young*, standards of "arbitrary and capricious" or "arbitrary and unreasonable"—standards used in the instant case—have been regularly applied

[15] *CCR Report*, p. 86.

by the Virginia Court in delineating the scope of the police power. In another leading case, *Moore* v. *Sutton,* 185 Va. 481, 39 S.E.2d 348 (1946), the Court used this approach in striking down a statute regulating the practice of photography. The justices could not see public health, safety, morals, or other interest sufficiently affected by the practice of photography as to justify the legislation.

In applying "arbitrariness" and "reasonableness" standards, the Virginia Court has explicitly recognized that by this state law route it may invalidate exercises of the police power which might be upheld were the only question one of Fourteenth Amendment standards applied by the United States Supreme Court. In *Moore* v. *Sutton, supra,* striking down a statute regulating the practice of photography, the court recognized that a contrary result would be reached were the standard a federal one (citing *Nebbia* v. *New York,* 291 U.S. 502 (1934)), but it rested the result on Article I, Section 1 of the Virginia Constitution—a mandate "so vital to the welfare of a free and untrammeled people." [16]

The standards used by the Virginia court in this case—finding the Board's actions to have been discriminatory and hence arbitrary and capricious—thus have their source in a long line of Virginia cases measuring exercises of the police power against the requirements of Virginia's Constitution, especially Article I, Sections 1, 8, and 11.

Zoning cases. In zoning cases specifically, as in police power cases generally, the Supreme Court of Vir-

[16] 39 S.E.2d at 351, 352.

ginia has repeatedly used Virginia standards of "arbitrary," "capricious," "unreasonable," and like language quite independently of federal constitutional measures. In *Board of Supervisors* v. *Carper,* 200 Va. 653, 107 S.E.2d 390 (1959), the court found that the effect of Fairfax County's Freehill Ordinance was to prevent people of modest means from living in the western two-thirds of the County. Declaring that the County may not "arbitrarily or capriciously" deprive one of the legitimate use of his property, the court found the amendment to be "unreasonable and arbitrary, [bearing] no relation to the health, safety, morals or general welfare." The court cited no specific state or federal constitutional provisions. In another case, *Boggs* v. *Board of Supervisors,* 211 Va. 488, 178 S.E.2d 508, 510-11 (1971), the court held that precluding a landowner of all beneficial use of his property was "unreasonable and confiscatory, and therefore unconstitutional." Here again no state or federal constitutional provisions were cited.

When the Supreme Court of Virginia intends to rest a decision on Fourteenth Amendment due process or equal protection grounds, it has only to say so. There are ample decisions in which it has done just that.[17] In light of those decisions, it strains a point to try, as Petitioner does here, to extract a federal constitutional ground from a decision whose language is so completely in line with the general run of Virginia decisions testing exercises of the police power against Vir-

[17] See, *e.g., Archer* v. *Mayes,* 213 Va. 633, 194 S.E.2d 707 (1973); *Standard Drug Co.* v. *General Electric Co.,* 202 Va. 367, 117 S.E.2d 289 (1960); *Weber City Sanitation Comm'n.* v. *Craft,* 196 Va. 1140, 87 S.E.2d 153 (1955); *Williams* v. *City of Richmond,* 177 Va. 477, 14 S.E.2d 287 (1941).

ginia standards of "discrimination," "arbitrary and capricious," and "unreasonable."

II. No Federal Question has been Previously Raised and the Decision Rests on Adequate and Independent State Grounds.

Rule 23 1(f) Supreme Court of the United States Rules requires that the Petitioner specify the stage in the proceedings in the Court of first instance and in the Appellate Court at which point a federal question sought to be reviewed was raised. Petitioner has not done this and indeed he can not because no federal question was raised, it apparently having been considered to be an issue for the first time by the County Board of Arlington when they determined to apply to this Court.

Their argument is a strange one in that they appear to claim that the Circuit Court of Arlington and the Supreme Court of Virginia have denied equal protection of the law to the unspecified residents of the area in which the subject land is located. Their argument is if the County Board grants a change of zoning to a property owner, it is denying equal protection of the laws to all other property owners in the neighborhood who may or may not have wished the zoning change to be put into effect. They argue that residents of the County may not ". . . rely on its intention to maintain a family residential district as a basis for imposing single-family use restrictions." (Page 21, Petition for Writ of Certiorari in this case.) This is a patently fatuous argument. The County Board of Arlington had declared the subject block to be a residential area and so zoned it. It then ignored its own original zoning and proceeded, step by step, from North Pierce Street westward to change the R-6 zone to RA 6-15, lot by lot

changing all of the block save and except the two subject lots and two other very small lots.

At the time of the application by Mrs. God for a change of zoning, the Board had changed its political philosophy and refused to apply those same standards previously applied by its predecessors and justified its refusal for reasons or lack of reasons which the trial Court found to have been arbitrary and capricious. It is no more complicated than that.

The decision in this case is grounded in Virginia statutes in two ways. In the first place, the court's conclusion that the Board's action was discriminatory, hence arbitrary and capricious, and thus bore no reasonable or substantial relation to the public health, safety, morals, or general welfare directly parallels the Virginia statutes under which counties exercise the police power generally and the zoning power specifically. Secondly, the decision rest squarely on an earlier Virginia decision, *Board of Supervisors* v. *Carper,* 200 Va. 653, 107 S.E.2d 390 (1959), which in turn had found discrimination in violation of a Virginia statute requiring uniformity in zoning regulations.

"This Court from the time of its foundation had adhered to the principle that it will not review judgments of state courts that rests on adequate and independent state grounds." *Herb* v. *Pitcairn,* 324 U.S. 117, 125 (1945). The burden is on Petitioner seeking a writ of certiorari from this Court to make an affirmative showing from the record

> not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of

> the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. *New York ex rel. Pierson,* 293 U.S. 52, 54 (1934). The basis for this rule lies in the limits of the Court's jurisdiction—that the Court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *Herb* v. *Pitcairn,* 324 U.S. at 125-26.

III. Even Assuming Federal Grounds of Decision Are Involved, the Decision Involved No Question of Sufficiently General Importance Worthy of Certiorari.

Zoning and land use are matters peculiarly within the state interest and concern. Indeed the authority to regulate and control the individual property owner's use of land resides in the local jurisdiction under the police power pursuant to a delegation of this authority by the state legislature.[18] If the present system of delegating and defining the scope of the zoning power does not effectively serve the interest of a particular state in furthering the general welfare of the locality, region, or entire state,

> It is the state legislature's and not the federal courts' role to intervene and adjust the system . . . [T]he federal court is not a super zoning board . . . *Construction Industry Association of Sonoma County* v. *Petaluma,* Slip Opinion at 17, Record No. 74-2100 (9th Cir., August 13, 1975).

the proper forum for resolving land use questions and policies is at the state and/or local level. A dramatic

[18] See Va. Code Ann. §§ 15.1-486, -489 in Appendix, *infra,* at pp. 2a, 3a.

intrusion of the kind sought by Petitioner into an area of traditional state concern is not warranted. Cf. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 40 (1973).

The Board also argues that the Virginia court's decision invalidating the Board's actions in this case denies other citizens of Arlington County due process of law by impairing the Board's legislative functions. Aside from ignoring the court's finding that the Board's land use policies in fact discriminate against and exclude "other citizens," such an argument asks this Court to review a state court's decisions about the reach and amenability to judicial scrutiny of state police power, a matter peculiarly governed by state law. Decisions as to what functions should be performed by state courts and what by legislative bodies, in short questions of separation of powers in state and local governments, are for the states to decide. Cf. *Sweezy* v. *New Hampshire,* 354 U.S. 234, 255 (1957).

Zoning issues, especially the reasonableness of ad hoc decisions on particular rezoning applications, typically are determined on the basis of the facts and circumstances in each case. *Euclid* v. *Ambler Realty Co., supra,* 272 U.S. at 387-88. The precedential value of any particular case is therefore inherently limited even within its own jurisdiction, and its ability to exert influence across state lines is even more tentative.

The facts and circumstances in this case involving two small lots greatly limits their precedential value. There are certainly no new principles of law enunciated in this case.

The relevant equal protection and due process standards are easily stated. Equal protection requires that the classification "must be reasonable, not arbitrary, and must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). Due process, "as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object to be attained." *Nebbie* v. *New York, supra,* 291 U.S. at 525.

Court called upon to decide the constitutionality of zoning actions as they impinge upon private property rights inevitably are being asked to balance, on the facts of the particular case, the private and public interests at stake—the purpose of the regulation, its economic impact upon a property owner, the fairness of classification, etc. Rezoning applications in particular require ad hoc decisions, no two of which are just alike.

Both equal protection and due process are ultimately concerned that arbitrary or invidious distinctions are not made among those who, in light of a zoning ordinance's legitimate purposes, ought not to be treated differently. The important point, for the purposes of certiorari, is that it would be an unfortunate use of this Court's limited time to sift the facts of a particular rezoning case to see whether a state court drew permissible inferences of discrimination or arbitrariness which would support a conclusion that equal protection or due process was denied. This case

raises no question of general application about zoning power, and is not worthy of certiorari.

CONCLUSION

In essence this case is an effort to read into a state court opinion a federal ground which was not previously raised. It is an attempt to have this Court displace a state court's application of state constitutional and statutory standards to a locality's exercise of powers delegated to it by state law. It is an attempt to have this Court undertake to review factual findings turning on the circumstances of a particular Virginia county. How one state chooses, under its constitution and statutes, to measure the police powers of its own political subdivisions is clearly inappropriate for Supreme Court review.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

APPENDIX

Constitution of Virginia

Article I.

Bill of Rights

A DECLARATION OF RIGHTS made by the good people of Virginia in the exercise of their sovereign powers, which rights do pertain to them and their posterity, as the basis and foundation of government.

§ 1. Equality and rights of men—That all men are by nature equally free and independent and have certain inherent rights, of which when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

§ 8. Criminal prosecutions.—That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witness, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopary for the same offense.

Laws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class.

In criminal cases, the accused may plead guilty. If the accused plead not guilty, he may, with his consent and the concurrence of the Commonwealth's Attorney and of the court entered of record, be tried by a smaller number of jurors, or waive a jury. In case of such waiver or plea of guilty, the court shall try the case.

The provisions of this section shall be self-executing.

§ 11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.—That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil causes in courts of record to not less than five.

VIRGINIA CODE TITLE 15.1*

§ 15.1-486. Zoning ordinances generally; jurisdiction of counties and municipalities respectively.—That governing body of any county or municipality may, by ordinance,

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* Code sections are here reproduced as they appeared at the time of both trial court and Supreme Court of Virginia decisions in *Allman* and *Williams*. Sections 15.1-486 and 15.1-489 have since been amended, effective July 1, 1975, in a manner not pertinent to the subject decisions.

divide the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and area as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agricultural, commercial, industrial, residential, flood plane and other specific uses;

(b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;

(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses; and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used;

(d) The excavation or mining of soil or other natural resources; and

For the purpose of zoning, the governing body of a county shall have jurisdiction over all the unincorporated territory in the county, and the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality.

§ 15.1-488. Regulations to be uniform.—All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts.

§ 15.1-489. Purpose of zoning ordinances.—Zoning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of further accomplishing the objectives of § 15.1-427. To these ends, such ordinances shall be designed (1) to provide for adequate light, air, convenience of access, and safety

from fire, flood and other dangers; (2) to reduce or prevent congestion in the public streets; (3) to facilitate the creation of a convenient, attractive and harmonious community; (4) to expedite the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements; (5) to protect against destruction of or encroachment upon historic areas; (6) to protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health or property from fire, flood, panic or other dangers; and (7) to encourage economic development activities that provide desirable employment and enlarge the tax base.

§ 15.1-510. General powers of counties.—Any county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this State. Such power shall include, but shall not be limited to, the adoption of quarantine regulations affecting both persons and animals, the adoption of necessary regulations to prevent the spread of contagious diseases among persons or animals and the adoption of regulations for the prevention of the pollution of water in the county whereby it is rendered dangerous to the health or lives of persons residing in the county.